

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FREDERICK AND CAROLE ERMEL	:	DETERMINATION
	:	DTA NO. 816853
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the	:	
Year 1990.	:	

Petitioners, Frederick and Carole Ermel, 202 Crest Road, Ridgewood, New Jersey 07450, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1990.

The Division of Taxation, appearing by Terrence Boyle, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion for summary determination on the ground that petitioners failed to file a petition with the Division of Tax Appeals within 90 days of the issuance of a conciliation order.

The Division of Taxation, together with its Notice of Motion, submitted the affidavit of Christina L. Seifert, Esq., with attachments, including the affidavits of Thomas J. English and James Baisley, in support of its motion. Petitioners, appearing *pro se*, did not respond to the motion of the Division of Taxation. The Division of Taxation's motion was filed on March 15, 1999. Petitioners' response was due on April 14, 1999, which date began the 90-day period for the issuance of this order.

Upon review of the pleadings, and the affidavits and other documents submitted in support of the motion of the Division of Taxation, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners timely filed their petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioners, Frederick and Carole Ermel, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking review of a Notice of Deficiency of personal income tax dated October 25, 1995.

2. Following the conference held on June 19, 1996, the conciliation conferee issued a Conciliation Order (CMS No. 151645), dated November 1, 1996, which denied petitioners' request and sustained the Notice of Deficiency.

3. On November 23, 1998, the Division of Tax Appeals received the petition in this matter. Petitioners' petition was mailed by certified mail to the Division of Tax Appeals on November 20, 1998.

4. In support of the Motion for Summary Determination, the Division submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division's mailing procedures with respect to conciliation orders; a copy of a certified mail record; and a copy of the conciliation order which denied petitioners' request to reduce the amount of tax due and sustained the statutory notice.

5. The affidavit of Thomas J. English, Assistant Supervisor of Tax Conferences in the Division's Bureau of Conciliation and Mediation Services, sets forth the Division's general

procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the certified mail record (“CMR”), which is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. A BCMS clerk verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer or representative and then records on the CMR, under the heading “Certified No.,” the certified control number from each envelope next to the appropriate name. Certified number P255265499 was used for the conciliation order mailed to petitioners and certified number P255265500 was used for the copy of the conciliation order mailed to David Weiss, petitioners’ representative in this matter. The conciliation orders and the CMR are then picked up at BCMS by an employee of the Division’s Mail Processing Center.

7. According to Mr. English, each page of a CMR is a separate and individual certified mail record for the conciliation orders listed on that page only and each page contains spaces to record the “Total Number of Pieces Listed by Sender” and the “Total Number of Pieces Received at Post Office” for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to affix his or her signature.

Mr. English states that the CMR for conciliation orders mailed on November 1, 1996 consisted of two individual pages; the conciliation order mailed to petitioners was listed on page one of the two-page CMR. He indicates that the copy of the CMR attached to his affidavit is a true and accurate copy of the original. The certified control numbers on the CMR run consecutively on page one, from P255265493 through P255265506. All of the names and addresses listed on the CMR have been redacted except the entries for petitioners and their

representative. Petitioners' names and address appear on page one of the CMR with the certified mail number P255265499 appearing next to their names. There are 14 entries and 14 certified mail numbers on page one of the CMR; there were no deletions.

8. Page one of the CMR is date stamped November 1, 1996 by the Colonie Center branch of the U.S. Postal Service and contains a postal employee's signature verifying receipt. At the bottom of page one, the page on which petitioners' certified number is listed, the number "14" has been entered as the "Total Number of Pieces Listed by Sender" and the number "14" has also been entered as the "Total Number of Pieces Received at Post Office."

9. Mr. English states that the Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to show the date of mailing. The CMR is kept in BCMS as a permanent record. Mr. English also indicates that these procedures were the normal and regular procedures of BCMS on November 1, 1996.

10. The affidavit of James Baisley, Chief Processing Clerk in the Division's Mail Processing Center, sets forth the procedures followed by the Mail Processing Center in delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR.

A member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark or his or her signature to the CMR to indicate receipt by the USPS. In this case, the postal employee affixed a postmark to the CMR, wrote in the total number of pieces received ("14") and signed the CMR to indicate that 14

pieces were the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee wrote in the "Total Number of Pieces Received at Post Office" to indicate that 14 pieces were received is based upon the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the CMR.

Mr. Baisley states that, in the ordinary course of business and pursuant to the practices and procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and is delivered to the originating office by a member of his staff. He further indicates that the regular procedures of the Mail Processing Center, concerning the mailing of certified mail, were followed in the mailing to petitioners on November 1, 1996.

11. Petitioners claim in their petition that they did not receive the Conciliation Order until collection action began on the unpaid Notice of Deficiency by the Department of Taxation and Finance's Tax Compliance Division.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that

no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1], *see also*, Tax Law § 2006 [6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also*, ***Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see*, *Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgement must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Petitioners in this case did not respond to the motion of the Division for summary determination. Therefore, petitioners are deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see*, *Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170,

173). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, *supra* at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461). Such evidence in this matter includes the petition and the attachments submitted with the petition (20 NYCRR 3000.9[b][1]).

C. As indicated in Finding of Fact “2”, the conciliation conference was held on June 19, 1996 and a conciliation order was issued on November 1, 1996. The Conciliation Order sustained the statutory notice. Pursuant to Tax Law § 170(3-a)(e), the conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the order. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. Where a taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Thomas J. English and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing, by certified mail, of conciliation orders. The affidavits generally describe the various stages of producing and mailing conciliation orders and attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing herein. The documents establish that the general mailing procedures described in the English and Baisley affidavits were followed with respect to the conciliation order issued to petitioners. Petitioners' names and address appear on page one of the certified mail record which bears a USPS postmark of November 1, 1996 along with the signature of a postal service employee. There are 14 certified control numbers listed on page one and the USPS employee who signed the certified mail record indicated that he received 14 items for mailing. The Division has, therefore, established that it mailed the conciliation order to petitioners by certified mail on November 1, 1996.

E. Petitioners' petition was mailed by certified mail to the Division of Tax Appeals on November 20, 1998 and is, therefore, deemed filed on the same date (*see*, 20 NYCRR 3000.22[c][2]), a date which is over two years after the mailing of the conciliation order.

F. The Division has established that it mailed the Conciliation Order to petitioners on November 1, 1996 at their last known address. There is no dispute that the address on the Conciliation Order was petitioners' address at the time the notice was issued. Petitioners' petition states that petitioners never received the Conciliation Order. The mere denial of receipt is insufficient to rebut the presumption of receipt. Furthermore, the petition does not dispute the date of the notice (*see, Engel v. Lichterman*, 95 AD2d 536, 467 NYS2d 642, 643).

G. As noted in Conclusion of Law "C", a conciliation order is binding unless the taxpayer files a petition with the Division of Tax Appeals within 90 days after the order is issued. The last day on which petitioner could have timely filed the petition was January 30, 1997. The petition was filed with the Division of Tax Appeals on November 20, 1998. Unfortunately, this date is well past the statutory 90-day period within which a petition may be filed. The 90-day period for filing the petition is absolute and there is no provision in the Tax Law for the waiver or extension of such period (*see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, 661-662, *lv denied and appeal dismissed* 72 NY2d 938, 532 NYS2d 845; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Accordingly, the petition was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioners' case.

H. Finally, it is noted that petitioners are not without recourse here, for they may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If their request for a refund is denied, petitioners may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. The Division's motion for summary determination is granted, and the petition of Frederick and Carole Ermel is hereby dismissed.

DATED: Troy, New York
May 27, 1999

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE